BRIEF AND APPENDIX ON BEHALF OF APPELLANTS

In the

Supreme Court of the United States

October Term, 1958

No. 127

ALBERTIS S. HARRISON, JR., ATTORNEY GENERAL OF VIRGINIA, ET AL.,
Appellants,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, A CORPORATION, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INCORPORATED,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia

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Dated: February 13, 1959

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

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OPINION OF THE COURT BELOW

The opinion of the three-judge United States District Court for the Eastern District of Virginia, Richmond Division, is reported at 159 F. Supp. 503 (1958) as *National Ass'n. for Advancement of Colored People* v. *Patty.*

THE JURISDICTION OF THE COURT

The jurisdiction of this Court rests on 28 U. S. C., Section 1253.

The final decree of the court below was filed on April 30, 1958 (R. 122). The notice for appeal was filed on May 22, 1958 (R. 124).

THE STATUTES INVOLVED

The validity of three state statutes is involved. Chapters 31 and 32, pp. 29-33, Acts of the General Assembly of Virginia, Extra Session, 1956 (respectively codified as Sections 18-349.9 et seq. and 18-349.17 et seq. of the Code of Virginia, 1956 Additional Supplement, pp. 32-36) are registration statutes. Chapter 35, pp. 36-37, Acts of the General Assembly of Virginia, Extra Session, 1956 (codified as Section 18-349.25 et seq. of the Code of Virginia, 1956 Additional Supplement, pp. 36-37) relates to the crime of barratry. Due to the length of these statutes they are not here set out verbatim. Their text is set forth as Appendix I to this brief.

THE QUESTIONS PRESENTED

1. Under the facts of these cases, did the court below err in restraining the enforcement of criminal statutes of the Commonwealth of Virginia?

2. Did the court below err in holding that proceedings should be stayed only when state statutes under attack are vague and ambiguous?

3. Did the court below err in holding that the provisions of the statutes in question were so free from doubt as to not require definite adjudications in state courts?

4. Did the court below err in holding that all of the provisions of the registration statutes (Chapters 31 and 32) violated the Due Process Clause of the Fourteenth Amendment?

5. Did the court below err in holding that the barratry statute (Chapter 35) deprived the appellees of rights guaranteed by the Fourteenth Amendment?

STATEMENT OF THE CASE

The National Association for the Advancement of Colored People, hereinafter referred to as the NAACP, is a membership corporation organized under the laws of the State of New York (R. 498). It has local units or branches which have been organized as unincorporated associations in most of the states and the District of Columbia (R. 168). The branches in Virginia are grouped into an association called the Virginia State Conference and these branches support the NAACP and the State Conference by the payment of membership dues (R. 169-170).

Roy Wilkins heads the staff of the NAACP which is responsible to a board of directors. The staff members "preside over the functioning of the local branches throughout the country and the state conferences of branches" (R. 167). For all practical purposes the branches and the State Conference are constituent parts of the NAACP (R. 505).

The NAACP Legal Defense and Educational Fund, Incorporated, hereinafter referred to as "Legal Defense Fund", is a New York membership corporation organized for the following purposes as stated in its charter:

> "(a) To render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustice by reason of race or color and

unable to employ and engage legal aid and assistance on account of poverty.

"(b) To seek and promote the educational facilities for Negroes who are denied the same by reason of race or color.

"(c) To conduct research, collect, collate, acquire, compile and publish facts, information and statistics concerning educational facilities and educational opportunities for Negroes and the inequality in the educational facilities and educational opportunities provided for Negroes out of public funds; and the status of the Negro in American life" (R. 28).

There is only a small number of members of the Legal Defense Fund and no membership dues are required. Its income is derived mainly from contributors who are solicited by letter and telegram from New York City (R. 293, 294).

The Legal Defense Fund has been approved by the State of New York to operate as a legal aid society because of the provisions of the barratry statute of New York (R. 314).

Thurgood Marshall is Director and Counsel of the Legal Defense Fund and it is his duty to carry out the policies of the board of directors (R. 278). He has under his direction a legal research staff of six full time lawyers who reside in New York City but who may be assigned to places outside of New York (R. 279).

In addition to the full time staff, the Legal Defense Fund has lawyers in several sections of the country on a retainer basis and, in addition, approximately one hundred volunteer lawyers throughout the country who come in to assist whenever needed (R. 278). Spottswood W. Robinson, III, is the Southeast Regional Counsel for the Legal Defense Fund on an annual retainer. The southeast region includes the Commonwealth of Virginia (R. 288, 303). The Legal De-

fense Fund also has at its disposal social scientists, teachers of government, anthropologists and sociologists, especially in school litigation (R. 286).

The Operation of the NAACP

Speaking of the legal activity of the NAACP, Roy Wilkins testified:

> "Well, under legal activity we have sought to assist in securing the constitutional rights of citizens which may have been impaired or infringed upon or denied. We have offered assistance in the securing of such rights. Where there has been apparently a denial of those rights, we have offered assistance to go to court and establish under the Constitution or under the federal laws or according to the federal processes, to seek the restoration of those rights to an aggrieved party." (R. 170, 171)

Wilkins further testified that in assisting plaintiffs "we would either offer them a lawyer to handle their case or to help to handle their case and pay that lawyer ourselves, or we would advise them, if they had their own lawyer, would advise with them or assist in the costs of the case" (R. 177). No money ever passes directly to the plaintiff or litigant (R. 177).

The NAACP says publicly that it believes that a certain law is invalid and should be challenged in the courts. Negroes are urged to challenge such laws and if one steps forward, the NAACP agrees to assist (R. 179).

Although it is not in the regular course of business, prepared papers have been submitted at NAACP meetings authorizing someone to act in bringing law suits and the people in attendance have been urged to sign (R. 180).

Robert L. Carter, General Counsel for the NAACP, is

paid to handle legal affairs for the corporation. Representation of the various Virginia plaintiffs falls within his duties. The NAACP offers "legal advice and assistance and counsel, and Mr. Carter is one of the commodities" (R. 203, 204).

The State Conference has a legal staff composed of thirteen members and in every instance except two plaintiffs have been represented by members of such staff in cases in which assistance is given (R. 153).

All prospective plaintiffs are referred to the Chairman of the Legal Staff, Oliver W. Hill, and counsel for such plaintiffs makes his appearance when Hill has recommended that they have "a legitimate situation that the NAACP should be interested in" (R. 152).

The State Conference assists in cases involving discrimination and the Executive Board formulates certain policies to be applied in determining whether assistance will be given. Hill then applies these policies and when he decides that the case is a proper one, it is taken "automatically" with the concurrence of the President (R. 156).

Members of the Legal Staff of the State Conference attend meetings held by the branches in their capacity as counsel for the Conference and either the particular branch or the State Conference pays the traveling expenses incurred (R. 164).

Oliver W. Hill testified that he is not compensated as Chairman of the Legal Staff. It is his duty to advise Negroes who come to him voluntarily "or directly from some local branch, or after having been directed there by Mr. Banks" whether or not he will recommend to the State Conference that their case will be accepted (R. 207).

After a case is accepted, Hill selects the lawyer (R. 209). He refers the case to a member of the Legal Staff residing

in the particular area from which the complaining party came. For the Richmond area, "one of us would frequently handle the situation" (R. 208). A bill for the legal services is submitted to Hill who approves it with the concurrence of the President of the State Conference (R. 210).

Hill further stated that no investigation is made as to the ability of the plaintiffs to pay the cost of litigation. He feels that irrespective of wealth, a person has the right "to get cooperative action in these cases" (R. 222).

The Operation of the Legal Defense Fund

Thurgood Marshall testified that it is the policy of the Legal Defense Fund before sending assistance in a legal case that the case must be referred to it by either the party directly in interest or the party's attorney. When aid is given, the party's attorney is controlled solely by the canons of ethics and "by nothing or anybody else" (R. 280).

In the words of its Director and Counsel, the Legal Defense Fund operates in the following manner:

> "* * * If the investigation conducted either from the New York office or through one of our local lawyers reveals that there is discrimination because of race or color and legal assistance is needed, we will furnish that legal assistance in the form of either helping in payment of the costs or helping in the payment of lawyers fees, and mostly it is legal research in the preparation of briefs and materials of that type. We are getting calls all the time." (R. 279)

However, upon being examined concerning the meaning of a letter received from the southwest regional counsel of the Legal Defense Fund, Marshall stated that he assumed that there were particular plaintiffs requesting aid when it was stated that "Proposed legal action will include * * *

(c) Suits against strategically chosen school boards in Eastern Louisiana contiguous to Mississippi" (R. 308, 309, 637).

In the same letter to which reference is made above the following statement is found:

> "* * * We have a statute making racial segregation mandatory in the thirty-odd state owned and operated parks in Texas. We shall undoubtedly strive to test that law in 1956. *In the past we have found it extremely difficult to get persons to undertake to use the sensitive facilities such as restaurants, swimming pools, dance facilities, and the like. We shall continue to press that issue.*" (R. 638, 639) (Italics supplied)

The Legal Defense Fund does not cooperate if a case is referred by an organization including the NAACP (R. 280). However, the lawyer who has already been retained by the party receiving aid from the Legal Defense Fund is always on the legal staff of the State Conference of the NAACP (R. 289).

When a so-called client comes to a member of the legal staff of the State Conference, he may then receive aid, not only from the full legal staff of the State Conference, but also from the full legal staff of the Legal Defense Fund, including the services of its southeastern regional counsel (R. 292).

The testimony of Thurgood Marshall on cross-examination indicated that the Legal Defense Fund represented only those people who cannot afford to pay for litigation (R. 314). However, he stated that he knew of no instance in which an investigation was made to find out whether or not any of the plaintiffs could pay the cost of the school litigation in Arlington, Charlottesville, Newport News or Norfolk (R. 315).

Marshall further admitted that if a plaintiff owned real estate with a fair market value of $15,000.00, free and clear, he would be in pretty good shape to finance his own law suit (R. 316).

B. B. Rowe testified as to the fair market value of the real estate owned of record by the plaintiffs in Newport News school segregation case, the total value being in excess of $280,000 (R. 453-456).

Robinson, on being examined as an adverse witness by the defendants, stated that his duties do not require him to obtain a credit report or look extensively into the financial situation of the parties who may request assistance of the Legal Defense Fund (R. 334). As to the type of investigation conducted he stated:

> "I do not make an investigation beyond the point of looking at the client, if the client comes into the office, exercising judgment as to appearances as they do appear, and considering those in the light of what I am requested to do * * *" (R. 334)

Robinson further testified that the Legal Defense Fund would represent all of the plaintiffs in a class action even though all but one could afford the cost of the litigation (R. 341).

The Necessity for Chapters 31 and 35

Five witnesses who were plaintiffs in the Prince Edward County school segregation case testified on behalf of the appellants. All of them admitted signing a paper that reads in part as follows:

"'AUTHORIZATION

To Whom It May Concern:

"'I (we) do hereby authorize Hill, Martin and Robinson, attorneys, of the City of Richmond, Virginia, to act for and on behalf of me (us) and for and on behalf of my (our) child (children) designated below, to secure for him (her, them) such educational facilities and opportunities as he (she, they) may be entitled under the Constitution and laws of the United States and of the Commonwealth of Virginia, and to represent him (her, them) in all suits, matters and proceedings, or whatever kind or character, pertaining thereto." (R. 422)

However, all of them also testified:

1. They did not know that they were plaintiffs in the Prince Edward County school segregation case, which was filed in 1951, until 1956.

2. When they signed papers they thought only that they would obtain a better or new school for their children.

3. They have had no communication from Hill, Martin or Robinson concerning the law suit (R. 346-374).

Another witness who was a plaintiff in the Charlottesville school segregation case stated that he has had no conversation or written correspondence with Hill or Robinson, all of his contacts having been through the NAACP (R. 374).

Moses C. Maupin, who was also a plaintiff in the Charlottesville case, testified that he signed an authorization paper at a meeting of the NAACP at which time no lawyers were present (R. 377).

Otis Scott, also a plaintiff in the Prince Edward case, said that he was told by Hill and Robinson that "they wouldn't take the case up for segregated schools. If they

taken the case at all it would be on a non-segregated basis" (R. 476).

Viola Neal testified that she was a plaintiff in the Prince Edward case and authorized her attorneys, Hill and Robinson, to do what they thought best. She desired to end segregation in the public schools. On cross-examination she stated:

1. She did not talk to Hill or Robinson between the time of the school strike on April 23, 1951, and April 26 at which time she signed the authorization papers[1] (R. 479).

2. The authorization was signed before she had a conference with Hill or Robinson (R. 480).

3. Hill and Robinson had not discussed the Prince Edward case with her until they came to see her about testifying in this case (R. 480).

George P. Morton, a Prince Edward resident, stated that Hill and Robinson told him that the only way equal facilities could be obtained was to have a non-segregated school (R. 488).

Sarah B. Brooks, a plaintiff in the Charlottesville case, testified on cross-examination that speakers at a public meeting said "for all children and mothers who wanted children to go to a better school to sign up." She did not know she was authorizing a law suit and no one explained the authorization which she signed (R. 242-243).

Julian A. Sherman, a witness on behalf of the appellants testified as follows:

1. He was the Eastern Representative of the Claims Research Bureau of the Law Department of the Associ-

[1] The meeting at which Hill and Robinson were present and told the Negroes that they were prepared to file suit to end segregation was held on May 3 (R. 491).

ation of American Railroads, and participates in investigations of claims arising from personal injuries under the Federal Employer's Liability Act (R. 464-465).

2. Solicitation of personal injury claims is widespread in Virginia, as well as in the rest of the country, and division of fees is also widespread as well as offering of financial inducements to solicit business. Running and capping is indulged in by unethical attorneys and by laymen in their employ (R. 464-465).

3. The information required by Chapter 31 would help alleviate these conditions by supplying proof of the division of fees and of maintenance, thus enabling more effective prosecution (R. 465-466).

The Necessity for Chapter 32

Dr. Francis V. Simkins, professor of American History at Longwood College, Farmville, Virginia, testified that he has made a special study of Southern history. As to the history of secret societies, he stated that the Union League, formed in 1862 to promote patriotism in the North, spread to the South where it became an organization of Negroes and carpetbaggers. Its membership list was secret and under that cloak of secrecy its members committed acts of violence (R. 415-416).

The Ku-Klux Klan was the most important secret society in the South. It was notorious for its secrecy and also ultimately became notorious for the crimes it committed (R. 415-416). The Klan has had the tendency to reappear periodically and it exists today because of racial tensions (R. 419). Statutes requiring the disclosure of membership lists help curb the harmful activities of such organizations (R. 419).

John Patterson, the Attorney General of Alabama, recounted instances of racial disturbances and violence occurring in the State of Alabama, including the so-called "Montgomery bus boycott situation", instances in Birmingham, the towns of Maplesville, Marion and Tuskegee. General Patterson then pointed out that such a registration law as Chapter 32 "would help the authorities to enforce the law, catch the offenders, and possibly help us identify organizations that are working in certain areas so that we could take preventive measures to prevent the things from happening before they do" (R. 471-472).

The Superintendent of the Virginia State Police and four county sheriffs testified that Chapter 32 would be of help in law enforcement (R. 378).

The Sheriffs generally stated that an order to integrate the public schools would cause more racial tension, possibly bloodshed, and would raise difficult law enforcement problems. Secret organizations would antagonize the situation and in their opinion, the provisions of Chapter 32 would aid in crime detection, the prevention of violence and would be helpful in selecting additional deputies who may be needed in time of racial disturbances (R. 384-411).

Sheriff C. F. Coates, on cross-examination, further testified that a colored man had just complained to him that the NAACP placed pressure on him to join its local Branch. The testimony is as follows:

> "A colored man in my community came to me, on yesterday, and told me that the NAACP had put pressure on him to try to make him join the NAACP. He refused to join. They instructed him that he had to join and he had to vote like they said to vote, and if there was any bloodshed in that community from integration of the school that the NAACP was going to be in the middle of it. He refused to join it. The head

of this organization, so he said, on account of him refusing to join their organization, had sent a bunch of thugs around to his place to tear it up." (R. 403)

The Motives of the Legislature

Harrison Mann, a member of the House of Delegates from Arlington County, testified that he was the chief patron of Chapters 31, 32, 33, 35 and 36 and was responsible for the drafting of Chapters 32 and 35 prior to the special session of the General Assembly held in 1956 (R. 430-431).

Mann's reasons that prompted him to strive for the enactment of the statutes in question were:

1. The Autherine Lucy incident in Alabama and the violence ensuing therefrom (R. 428).

2. John Kasper was beginning his operations in Washington, right across the Potomac River (R. 428-429).

3. Existing racial tension in Virginia (R. 428-429).

4. The Prince Edward plaintiffs' ignorance of the fact that they had brought a law suit (R. 431).

5. The actions of the NAACP in Texas in soliciting and paying litigants (R. 436-437).

6. Charges of certain Arlington lawyers that the NAACP was engaged in practicing law (R. 431).

7. Certain white organizations were commencing suits in Maryland, Kentucky, Louisiana and elsewhere (R. 431).

8. The organization of the Defenders in Virginia and the recurrence of the Ku-Klux Klan in Florida (R. 434).

Economic Reprisals

The appellees, in an attempt to substantiate their allega-

tions of harassment, abuse and economic reprisals against its members and contributors, called eight witnesses, two being colored. Their testimony falls into two categories, those who told of social reprisals and threats and those who told of economic reprisals.

Jack C. Orndoff, a white plaintiff in the Arlington school segregation case, withdrew from the case because of abusive and threatening telephone calls and some letters received after a newspaper listed the names of all of the plaintiffs. No testimony was introduced to indicate that Orndoff was a member of or contributor to the NAACP or Legal Defense Fund (R. 230-233).

Mildred D. Brown, a resident of Charlottesville, testified that she was a member and officer of the Charlottesville-Albemarle Chapter of the Virginia Council on Human Relations. She started receiving threatening phone calls after her name appeared in a newspaper in connection with the organization of the said chapter on Human Relations in August, 1956. She has received no such calls since December, 1956 (R. 249). A cross was also burned in front of her house on September 6, 1956. Mrs. Brown attributed the cross-burning and some of the telephone calls at least indirectly to the activities of John Kasper and his White Citizens Council (R. 249). Since August, 1956, Mrs. Brown also has been shunned by some of her friends and their children have been forbidden to play with her children. There is no evidence that she is a member of or contributor to the NAACP or the Legal Defense Fund.

Sarah Patton Boyle is an author who has been advocating integration since 1951. Her articles in the field of race relations have been published as letters to the editor in the Norfolk-Virginia Pilot, the Richmond Times-Dispatch and the Charlottesville Progress. Mrs. Boyle also published

an article in the Christian Century and one in the Saturday Evening Post. Since 1951 she has received over two hundred letters, the contents of which vary from being reasonable to extreme insults and threats of violence (R. 265). The maker of one phone call threatened to have her husband fired, and a cross was burned about fifteen feet from her house (R. 265). The cross-burning is attributed, at least in part, to the activities of John Kasper and his followers (R. 268). Mrs. Boyle also stated that she has suffered public embarrassment and that her presence is now objectionable in certain social circles, all of which is a personal distress to her (R. 266). The harrassment which she has received in great volume was contributed to the article published in the Saturday Evening Post (R. 268). The evidence does not indicate that she is a member of or contributor to the NAACP or the Legal Defense Fund.

Mrs. Edith Burton, a member of the NAACP from Arlington, wrote to the newspapers attacking the activities of the Defenders, a pro-segregation organization. After that time she received anonymous communications in the form of letters and telephone calls. The phone calls have now stopped (R. 251).

Mrs. Margaret I. Finner, a white member of the NAACP, testified that she became a plaintiff in the Arlington school segregation case because of Orndoff's withdrawal. After her name was published in the newspapers as being a plaintiff, she received distressing anonymous communications (R. 252).

Barbara S. Marx was one of the white plaintiffs in the Arlington school segregation case, and she received disagreeable, obscene and threatening communications whenever her name gets in the newspapers (R. 260). It was not a secret that she was a member of the NAACP, and she

was well-known as a person promoting and advancing the integration cause in Virginia long before the school case (R. 262).

Robert D. Robertson, a Negro, stated that he was the President of the Norfolk Branch of the NAACP. After publicity was given to the fact that he requested the officials of Norfolk County to protect those people living in a subdivision called "Coronado," he received ugly and threatening telephone calls. He also got similar calls whenever Negroes got favorable court decisions such as in the Seashore State Park case and the Norfolk school segregation case (R. 234, et seq.).

As to economic reprisals, Sarah B. Brooks, a cleaning woman doing day work, testified that one of her employers dismissed her after her name appeared in the newspaper as being one of the plaintiffs in the Charlottesville school segregation case (R. 239-241). There was no evidence that she was a member of or contributor to the NAACP or Legal Defense Fund. Furthermore, it was stipulated by counsel that she has been fully employed by white employers since the discharge mentioned aforesaid (R. 492).

SUMMARY OF ARGUMENT

I.

The Court Below Should Have Declined to Exercise Its Equity Jurisdiction

A. The exceptional circumstances necessary for a court of equity to enjoin the enforcement of state criminal statutes were not present in these cases. A real threat of prosecution must be coupled with danger of great and irreparable injury before a federal court, in the exercise of its equity jurisdiction, will interfere with a state in the execution of

its criminal statutes. *Watson* v. *Buck*, 313 U. S. 387 (1941) and *Douglas* v. *Jeannette*, 319 U. S. 157 (1943).

A general threat by state officials to enforce laws which they are charged to administer (*United Public Workers* v. *Mitchell*, 330 U. S. 75, 88 (1947)) and the possibility of a fine (*Spillman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 96 (1935)) are not sufficient for the exercise of equity jurisdiction.

B. A federal court of equity should not decide that a state statute is constitutional or unconstitutional until definite determinations have been made by a state court. The doctrine of equitable abstention is in furtherance of well established policies of comity between state and federal courts and of the principle that constitutional questions will not be decided by federal courts unless they are unavoidable. *Government & C. E. O. C., C.I.O.* v. *Windsor*, 353 U. S. 364 (1957); *Albertson* v. *Millard*, 345 U. S. 242 (1953); *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944) and *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941).

While it is true that one of the reasons for declining to exercise equity jurisdiction is that a particular statute is vague and ambiguous, the court below erred in holding that proceedings should be stayed *only* when the statute is vague and ill-defined. The vast majority of the decisions of this court make no such affirmative assertion. Compare the dissent in *Albertson* v. *Millard*, *supra*.

C. Even assuming that the court below properly stated the doctrine of abstention, the provisions of the statutes involved in these cases are not so free from ambiguity as to need no definite adjudications in the state courts.

The court below stated that Chapter 35, the barratry statute, forbids the appellees to defray the expenses of racial litigation. A careful reading of the definitions contained in Section 1 thereof leads the appellants to believe that stirring up litigation must be coupled with the payment of expenses of litigation before there is a violation of Chapter 35.

Likewise, certain provisions of Chapter 32 were held to be too broad or too vague to be constitutional. It is not proper for a federal court of equity to predict that a state court could not save the statute by construction. This Court so construed the Federal Lobbying Act in *United States* v. *Harriss*, 347 U. S. 612 (1954) as to overcome the objection of unconstitutional vagueness.

Chapter 31 was declared unconstitutional for the same reasons as Chapter 32. Again, assuming the reason of the court below to be correct as to the applicability of the rule of abstention, the provisions of the statutes before this Court are not so definite, or so plainly unconstitutional that a state court, by no interpretation, could find them constitutional, in whole or in part.

II.

The Registration Statutes Do Not Restrict Freedom of Association in Such a Manner as to Violate the Due Process Clause.

While the court below has declared that certain clauses of Section 2 of Chapter 32 were either too broad or too vague to meet constitutional requirements and has refused to construe them in a constitutional manner, the primary constitutional objection to the registration statutes appear

to be the requirement of the disclosure of membership lists of the appellees.

The first clause of Section 2 of Chapter 32 provides for the registration of persons who lobby "in any manner". Certainly, the state courts are able to construe this clause to meet any constitutional objections that may be raised. *United States* v. *Harriss*, 347 U. S. 612 (1954).

The facts disclosed in the record of these cases justify the requirement, found in the second clause of Section 2 of Chapter 32, that persons whose activities include "the advocating of racial integration or segregation" must register. *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952); *Feiner* v. *New York*, 340 U. S. 315 (1951) and *Kasper* v. *Brittain*, 245 F. (2d) 92, cert. den. 355 U. S. 834 (1957).

The language, "cause or tend to cause racial conflicts or violence" found in the third clause of Section 2 of Chapter 32 was condemned for vagueness. Again, could not a state court, under the authority of *United States* v. *Harriss*, *supra*, construe this language to meet the charge of unconstitutional vagueness? Further, this court in *Beauharnais* v. *Illinois*, *supra*, did not condemn the phrase, "productive of breach of the peace or riots" found in an Illinois criminal statute. To the contrary, this Court approved of the state court's ruling characterizing the words prohibited by the statute as those "liable to cause violence or disorder."

Clause 4 of Section 2 of Chapter 32 and the provisions of Chapter 31 provide generally for the registration of those who solicit funds from the public for use in litigation. Such persons are further required to file with the State Corporation Commission a list of contributors and of members of organizations whose dues may be used to finance litigation. Similar provisions or "restrictions" have been approved in such cases as *United States* v. *Harriss*, *supra*;

Sonzensky v. *United States*, 300 U. S. 506 (1937); *Burroughs* v. *United States*, 290 U. S. 534 (1934).

The appellants contend also that the case of *Bryant* v. *Zimmerman*, 278 U. S. 63 (1928), is in point and that this Court's decision on the due process question contained therein was not based on the illegal aims of the organization.

The appellants further urge that this Court's recent decision in *NAACP* v. *Alabama*, 357 U. S. 449 (1958), may be distinguished on the grounds that the facts in the record in these cases clearly show that the enactment of the registration statutes was justified as being in the public interest.

Finally, the court below erred in considering the legislative history of these statutes to determine the motives or purposes of the state legislature, and in this "setting" in passing upon their constitutionality.

III.

Chapter 35 Does Not Violate the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment

The court below misconstrued the provisions of Chapter 35 by holding that they prohibited the appellees from defraying the expenses of litigation. It is the appellants' contention that the appellees must be shown to be guilty of stirring up litigation before the defraying of expenses of litigation becomes a crime. Based on this construction no case has been found that holds that the exemption of legal aid societies is an unreasonable classification. Chapter 35 is substantially similar to the common law offense of barratry and does not violate the Due Process Clause. *McCloskey* v. *Tobin*, 252 U. S. 107 (1920).

ARGUMENT

I.

The Court Below Should Have Declined to Exercise Its Equity Jurisdiction

The attendant facts of these cases require discussion of three separate principles or rules of equity. The first is the time-honored equity principle that courts ordinarily will not enjoin the enforcement of a criminal statute. The second is based upon public policy and is well stated by Mr. Justice Stone in *Pennsylvania* v. *Williams*, 294 U. S. 176, 185 (1935):

> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

The third rule or principle to be discussed is that federal courts are loath to pass on a federal constitutional question when there is another non-constitutional question which may well dispose of the case in a state court. An authoritative construction of a state statute by a state court may void the necessity for determining a federal constitutional question.

A.

The Three-Judge District Court Should Not Have Restrained the Enforcement of Criminal Statutes of the Commonwealth of Virginia.

The record in these cases does not show that the appellees were threatened with prosecution under the provisions of Chapters 31, 32 or 35. Further, it has been uniformly held that a general threat by state officials to enforce laws which

they are charged to administer is not sufficient for the exercise of equity jurisdiction. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 88 (1947).

Certain facts in *Watson* v. *Buck*, 313 U. S. 387 (1941), are strikingly similar to circumstances surrounding these cases. There, the American Society of Composers, Authors and Publishers (ASCAP) together with individual composers, authors and publishers of music controlled by ASCAP brought suit to restrain the Attorney General of Florida and all state prosecuting attorneys, who were charged with the duty of enforcing certain parts of two Florida statutes, from enforcing a 1937 statute and certain sections of a 1939 statute. The complaint alleged that the defendants "had threatened to—and would, unless restrained —enforce" the statutes in question. The defendants in their answer specifically denied that they have made any threats to enforce the statutes but admitted as to the 1939 law that they would perform all duties imposed upon them by such law. This Court made the following observation concerning the question of threats of prosecution in the *Watson* case at page 399:

> "* * * The most that can possibly be gathered from the meager record references to this vital allegation of complainants' bill is that though no suits had been threatened, and no criminal or civil proceedings instituted, and no particular proceedings contemplated, the state officials stood ready to perform their duties under their oath of office should they acquire knowledge of violations. * * *"

The appellees in the instant cases merely alleged in their complaints that the appellants were charged with the enforcement of Chapters 31, 32 and 35. In response, the appellants stated that their duties and responsibilities were

fixed by law. No evidence was introduced to the effect that the appellants had threatened to prosecute suits against the appellees or take action against anyone under the statutes. It must be concluded, then, that the language of this Court, quoted above, is applicable to the facts of these cases.

This Court concluded in *Watson* v. *Buck, supra,* at p. 401, that "neither the findings of the court below nor the record on which they were based justified an injunction against the state prosecuting officers" and said:

> "* * * The clear import of this record is that the court below thought that if a federal court finds a many-sided state criminal statute unconstitutional, a mere statement by a prosecuting officer that he intends to perform his duty is sufficient justification to warrant the federal court in enjoining all state prosecuting officers from in any way enforcing the statute in question. Such, however, is not the rule. 'The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. . . . To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. . . . We have said that it must appear that 'the danger of irreparable loss is both great and immediate;' otherwise the accused should first set up his defense in the state court, even though the validity of a statute is challenged. There is ample opportunity for ultimate review by this Court of federal questions.' Spielman Motor Sales Co. v. Dodge, 295 US 89, 95, 96, 79 L ed 1322, 1325, 1326, 55 S Ct 678." (313 U. S. 400-401)

The court below appeared to recognize that in the absence of danger of great, immediate and irreparable injury, a federal court, in the exercise of its equity jurisdiction, will not interfere with a state in the execution of its criminal

statutes. However, it concluded that the facts "abundantly" justified the exercise of its equitable powers. What are such facts? They may be placed under four headings and, as stated in the words of the court below, are:

1. The penalties prescribed by the statutes are heavy and under Chapter 32 each day's failure to register constitutes a separate offense;

2. The deterrent effect of the statutes upon the acquisition of members;

3. The deterrent effect of the statutes upon the lawyers of the appellees under the threat of disciplinary action; and

4. The danger of immediate and persistent efforts on the part of state authorities to interfere with the activities of the appellees (159 F. Supp. 521).

Persons violating the provisions of Chapters 31, 32 and 35 are deemed guilty of a misdemeanor and Section 19-265 of the Code of Virginia, 1950, reads as follows:

> "A misdemeanor, for which no punishment or no maximum punishment is prescribed by statute, shall be punished by fine not exceeding five hundred dollars or confinement in jail not exceeding twelve months, or both, in the discretion of the jury or of the trial justice, or of the court trying the case without a jury."

Certainly it cannot be held that a misdemeanor penalty is so "heavy" as to be deemed "exceptional circumstances" for enjoining the enforcement of a state criminal statute. Further, the provisions of Chapters 31 and 32 to the effect that persons who knowingly make a false or fraudulent affidavit shall be guilty of a felony and punished as provided by Sections 18-238 and 18-239 of the Code of Virginia,

1950, cannot be said to be so unusual or heavy as to warrant the interference of a court of equity. Sections 18-238 and 18-239 read, respectively, as follows:

> "If any person commit or procure another person to commit perjury, he shall be confined in the penitentiary not less than one nor more than ten years; or, in the discretion of the jury, be confined in jail not exceeding one year, or fined not exceeding one thousand dollars, or both."
>
> "He shall, moreover, on conviction thereof, be adjudged forever incapable of holding any post mentioned in §2-26, or of serving as a juror."

Since, of course, corporations are not jailed, a fine not to exceed ten thousand dollars, as provided by the provisions of Chapters 31, 32 and 35, cannot be considered excessive or "heavy". Also, placing individual responsibility upon the officers and directors of a corporation to see that a fine for violation of Chapters 31 and 32 is paid is not unusual under our jurisprudence.

Chapters 31 and 35 provide that foreign corporations violating the provisions thereof shall have their certificates of authority to transact business in Virginia revoked by the State Corporation Commission. Again, such a penalty is not foreign to our system of laws.

Chapter 32 does provide that each day's failure to register shall constitute a separate offense. However, can it be prophesied that a jury or trial court would place an excessive fine on a corporation which in good faith did not register because it was advised, for example, that the provisions of Chapter 32 were not applicable to it? Conceding that such a penalty is not usually found in many criminal statutes it is not unknown. Furthermore, assuming that it is too "heavy" and necessitates interference by a court of equity as the

court below found, does it follow that the enforcement of a barratry statute and a registration statute, with normal criminal provisions, should likewise be enjoined? The cases decided by this Court answer this question in the negative.

The possibility of a fine is a consequence hardly demanding the interference of any court of equity. *Spillman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, 96 (1935).

As to the deterrent effect of the statutes upon the acquisition of members, it is to be noted that the complainants in *Watson* v. *Buck, supra*, claimed that the Florida laws were "confessedly aimed at ASCAP and its constituent members" and would virtually destroy them. *Buck* v. *Gibbs*, 34 F. Supp. 510, 513-514 (1940). Even this was not enough to warrant the interference of a federal court of equity.

Moreover, the court below was not justified in implying that the appellees could not obtain relief from the "deterrent effect" in a state court. It should also be pointed out that this "deterrent effect" could be applicable only to Chapters 31 and 32. The barratry provisions of Chapter 35 could have no effect on the acquisition of members.

As to the fact that the statutes had a deterrent effect upon the lawyers of the appellees "under the threat of disciplinary action", it has already been pointed out that the record in these cases does not justify such a finding of fact. The lawyers have been threatened by no one. Again, such a fact, if indeed true, could not justify an interference with the registration provisions of Chapters 31 and 32. The lawyers of the appellees, of course, stand in danger of disciplinary action if they are guilty of stirring up litigation. All other members of the Virginia bar stand in like danger.

Finally, there is nothing in the record to show that state authorities have made persistent efforts to interfere with the activities of the appellees. To repeat, there have been no threats of prosecution.

In *Douglas* v. *Jeannette,* 319 U. S. 157 (1943), this Court held that the facts of the case did not justify the restraint of threatened criminal prosecutions of members of Jehovah's Witnesses. The complaint was dismissed even though the challenged ordinance was (1) unconstitutional; (2) convictions and threats of convictions had occurred under the ordinance; and (3) there were numerous members of a class threatened with prosecution.

Assuming for sake of argument that the penalties show great and irreparable injury to the appellees, the court below has ignored the principle that such injury must be coupled with actual threats of prosecution. Such threats are not present in these cases. Language in *Watson* v. *Buck, supra,* is again material and controlling. There, this Court said at page 400:

> "* * * The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified. * * *"

Compare *Terrace* v. *Thompson,* 263 U. S. 197 (1923), where the plaintiff would have had to risk confiscation of his real property in order to test the validity of a state statute in a criminal prosecution.

To conclude, it is appropriate to quote the following language from *Stefanelli* v. *Minard,* 342 U. S. 117, 120 (1951), which dealt with the discretion of federal courts in enjoining state criminal proceedings:

> "* * * Here the considerations governing that discretion touch perhaps the most sensitive source of fric-

tion between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States."

B.

THE COURT BELOW ERRED IN HOLDING THAT PROCEEDINGS SHOULD BE STAYED ONLY WHEN THE STATUTES INVOLVED ARE VAGUE AND ILL-DEFINED.

The doctrine of equitable abstention is here involved. It is invoked by a federal court of equity, even though a showing of danger of great and immediate injury is present, in the furtherance of well established public policies, namely:

1. Proper comity between state and federal courts requires scrupulous regard for the rightful independence of state governments and their courts, and

2. The principle that federal courts should refrain from decision on constitutional questions unless it is unavoidable.

The exhaustive dissenting opinion of the court below on the question here presented, found at 159 F. Supp. 540-548, ably expresses the views of the appellants. There, the dissenting judge concluded that the decisions of this Court do not support the holding that proceedings should be stayed *only* where an ill-defined statute is involved.

The appellants do not disagree with the decision in *Doud* v. *Hodge*, 350 U. S. 485 (1956), cited by the majority below, to the effect that the three-judge district court had jurisdiction of these cases. The withholding of equitable relief under the doctrine of absention is not a denial of the jurisdiction which Congress has conferred on the federal courts. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 297 (1943).

The following language found in the majority opinion below is also approved by the appellants:

> "See also A. F. of L. v. Watson, 327 U. S. 582, 599, 66 S. Ct. 761, 90 L. Ed. 873, where, in directing a district court to retain a suit involving the constitutionality of a state statute pending the determination of proceedings in the state courts, the Supreme Court said that the purpose of the suit in the federal court would not be defeated by this action, since the resources of equity are adequate to deal with the problem so as to avoid unnecessary friction with state policies while cases go forward in the state courts for an expeditious adjudication of state law questions." (159 F. Supp. at p. 522)

Furthermore, *A. F. of L.* v. *Watson,* 327 U. S. 582 (1946), does not stand for the proposition that federal courts of equity should stay proceedings *only* where it is reasonably possible for a state statute to be given an interpretation which will render it constitutional. Such does not appear as an affirmative assertion. In the late Mr. Justice Murphy's dissent at page 606 he stated:

> "* * * But there are federal constitutional issues inherent on the face of this provision that do not depend upon any interpretation or application made by Florida courts. Those issues were raised and decided in the court below. And they should be given appropriate attention by this Court."

A federal court of equity should not decide that a state statute is constitutional or unconstitutional until definite determinations have been made by a state court. This is true even though the provisions of such statute appear to be free of doubt or ambiguity. *Albertson* v. *Millard,* 345 U. S. 242 (1953).

In the *Albertson* case, the Communist Party of Michigan and its Executive Secretary brought suit in a federal court to enjoin the enforcement of the Michigan Communist Control Bill, requiring the registration of Communists, the Communist Party and Communist front organizations, on the ground that it was unconstitutional vague. The three-judge district court held that the statute was constitutional and this Court vacated the judgment with directions to hold the proceedings in abeyance pending state court construction of the statute. While it is true that a state court proceeding on the statute was pending at the time of this Court's decision, it was brought after the proceeding began in the federal courts. This fact is not decisive in view of this Court's directive at page 245 "to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts either in pending litigation or other litigation which may be instituted."

As in *A. F. of L.* v. *Watson, supra,* the dissent in the *Albertson* case makes it clear that this Court approves the application of the doctrine of equitable absention even though a statute is not ill-defined in the view of a three-judge federal court. In the latter dissent, Mr. Justice Douglas felt that the case should be disposed of on its merits since there were no abstract questions or ambiguities involved and since it was plain beyond argument that the complainants were covered by the statute.

The majority of the court below cited three other decisions of this Court, without analysis, and apparently based its decision mainly upon a dissenting opinion of the late Chief Judge Parker in *Bryan* v. *Austin,* 148 F. Supp. 563 (D.C. E.D.S.C., 1957), in holding:

> "The policy laid down by the Supreme Court does not require a stay of proceedings in the federal courts

> in cases of this sort if the state statutes at issue are free of doubt or ambiguity. * * *" (159 F. Supp. 503, 533)

However, in the later case of *Lassiter* v. *Taylor*, 152 F. Supp. 295 (D. C. E.D. N.C., 1957), a three-judge federal court of which Chief Judge Parker was also a member handed down a *per curiam* opinion involving a statute prescribing a literacy test for voters.[2] The only question in the case was whether the statute should be declared void on the ground that it was violative of the complainants' rights under the Federal Constitution. The action was stayed on the following ground:

> "Before we take any action with respect to the Act of March 27, 1957, however, we think that it should be interpreted by the Supreme Court of North Carolina in the light of the provisions of the State Constitution. Government and Civic Employees Organizing Committee etc. v. S. F. Windsor, 77 S. Ct. 838. * * *" (152 F. Supp. at p. 298)

The case of *Government & C. E. O. C., CIO* v. *Windsor*, 353 U. S. 364 (1957), relied upon in *Lassiter* v. *Taylor*, *supra*, was decided by this Court after *Bryan* v. *Austin*, *supra*, and it must be assumed that chief Judge Parker, himself, recognized that the *Windsor* case did not stand as authority for the rule that a federal court of equity should stay an action only when the state statute involved was vague and ambiguous. In other words, the majority below, relying upon the dissenting opinion in *Bryan* v. *Austin*, committed error by ignoring the later case of *Lassiter* v. *Taylor* and misconstruing the *Windsor* decision.

In the *Windsor* case this Court held that a three-judge

[2] For the text of the statute, see Appendix II of this brief.

district court must neither decide that a state statute is constitutional nor decide that it is unconstitutional until after definite determinations had been made by the state courts.

An examination of the factual background of the *Windsor* case leads to the inescapable conclusion that the merits of these cases should not have been reached by a three-judge federal court at this time. There, a labor organization and one of its members who was employed by the Alabama Alcoholic Beverage Control Board (A. B. C. Board) filed suit in a federal district court seeking a declaratory judgment and an injunction to restrain the enforcement of a statute referred to as the Solomon Bill.[3] The defendants were officials of the A. B. C. Board. Section 2 of the statute provides:

> "Section 2. Any public employee who joins or participates in a labor union or labor organization, or who remains a member of, or continues to participate in, a labor union or labor organization thirty days after the effective date of this act, shall forfeiture all rights afforded him under the State Merit System, employment rights, re-employment rights, and other rights, benefits, or privileges which he enjoys as a result of this public employment."

Although no employee of the A. B. C. Board had been threatened with deprivation of his rights under the provisions of Section 2, quoted above, officials had informed the union that the statute would be enforced in the same manner as other pertinent laws.[4]

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[3] The full text of the Alabama Statute is set forth as Appendix III of this brief.

[4] It is also to be noted that two hundred and fifty employees of the A. B. C. Board were members of the union before the passage of the statute while only one or two continued membership after passage. (78 So. (2nd) 646, 649).

The complainants urged that the Solomon Bill was subject to no possible construction other than that of unconstitutionality under the Due Process Clause of the Fourteenth Amendment since the Alabama legislature had used "unmistakably simple, clear and mandatory language". The district court applied the doctrine of equitable abstention and withheld the exercise of its jurisdiction pending an exhaustion of state judicial remedies. It observed that the statute could be construed to meet the challenge of unconstitutionality (116 F. Supp. 354). This Court affirmed the judgment (347 U. S. 901).

The union then filed suit in a state circuit court praying for a declaratory judgment to determine its status under the Solomon Bill. The Supreme Court of Alabama affirmed the final decree of the circuit court which had held that the statute was applicable to the union, its activities and its members. (262 Ala. 785, 78 So. (2nd) 646).

At this stage of the proceedings, the state court had made a determination that the Solomon Bill was applicable to the complaining union and its members. The other sections of the statute could not be termed vague and ambiguous. Accordingly, when the case was again submitted to the three-judge district court for final decree, it was dismissed with prejudice on the ground that the Alabama court had not construed the statute in such a manner as to render it unconstitutional (146 F. Supp. 214).

This Court reversed the second judgment of the three-judge district court "with directions to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted". In so doing, this Court said:

"* * * In an action brought to restrain the enforcement of a state statute on constitutional grounds, the federal court should retain jurisdiction until a definite determination of local law questions is obtained from the local courts. * * * The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellants' freedom-of-expression and equal-protection arguments had been presented to the state court, it might have construed the statute in a different manner. * * *" (353 U. S. at page 366)

The similarity of the facts in the *Windsor* case with the facts of these cases is striking. In both, constitutional questions concerning the alleged abridgements of freedom of speech and association were presented to the three-judge district courts. The effect of the passage of the Alabama statute and two of the Virginia statutes here involved was found by the courts below to have brought about a loss of members and a resulting reduction of the revenues of the complainants. The penalties prescribed by the Alabama statute were of as great, if not greater, severity. Finally, there had been no actual enforcement of the statutes in either state. It should also be noted that there is nothing in the record of these cases to uphold the majority's statement that a multiplicity of suits would be prevented by the exercise of the court's equity jurisdiction.

In these cases, the majority below clearly should have withheld a decision on the merits under the authority of the *Windsor* case. By doing otherwise, it has made a tentative answer which may be displaced tomorrow by a state adjudication. "No matter how seasoned the judgment of the district court may be, it cannot escape being a forecast

rather than a determination". *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 499 (1941).

The appellees could have proceeded in a state court under Virginia's Declaratory Judgment Act (Sections 8-578-585 Chapter 25, Title 8, Vol. 2, pp. 407-411, Code of Virginia, 1957 Replacement Volume), as indeed they have as to Chapters 33 and 36, Acts of Assembly of Virginia, Extra Session, 1956, in accordance with the directions of the Court below. If the majority of the Court below had so directed, the rights of the appellees would have been fully protected and a state court would have had the opportunity to consider the statutes here involved in light of the constitutional questions raised below. This would have been in accord with the *Windsor* case. Further, the majority below would have avoided forecasts of local laws which the decisions of this Court condemn. *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101 (1944).

Finally, it must be emphasized that the majority below declared Chapters 31, 32 and 35 unconstitutional *in toto*. The Virginia legislature expressed a purpose directly contrary to this finding as to Chapter 32 by the enactment of Section 8 hereof. It reads:

> "If any one or more sections, clauses, sentences or parts of this act shall be adjudged invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provisions held invalid, and the inapplicability or invalidity of any section, clause or provision of this act in one or more instances or circumstances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance."

As to Chapters 31 and 35, the Supreme Court of Appeals of Virginia has repeatedly applied the test of separability,

even in the absence of a saving provision. *Hannabass* v. *Maryland Casualty Co.*, 169 Va. 559 (1938).

There are many clauses and sections of the statutes before this Court and the majority below made no attempt to save any parts thereof. Similar action was condemned by this Court in *Watson* v. *Buck, supra,* at pp. 395-396.

If a state court struck down the requirements of revealing lists of contributors and members to the public, could it be said beyond doubt that the remaining provisions of Chapters 31 and 32 would abridge free speech and association or fall by reason of legislative intent? At the least, questions of law remain undecided which should be first considered by the state courts.

C.

The Majority Below Erred in Holding That the Statutes in Question Were So Free from Ambiguity as to Need No Definite Adjudications in State Courts.

The appellants contend that even under the lower court's application of the doctrine of equitable abstention decision in these cases should have been stayed at that time.

The majority below discussed at great length what was claimed to be the legislative history of the statutes in these cases. It was asserted in a footnote that this is necessary and "of the highest relevance" when a claim of unconstitutionality is put forward. The case of *Lane* v. *Wilson*, 307 U. S. 268 (1939) is relied upon to uphold such an assertion. However, a perusal of that decision does not reveal that such a rule was announced therein.

The appellants do not believe that mere assertion of a claim that a statute is unconstitutional could change long established rules of statutory construction. The legislative

history of a statute is immaterial when its language is unambiguous. *United States* v. *McKesson & Robbins*, 351 U. S. 305 (1956) and *Steiner* v. *Mitchell*, 350 U. S. 247 (1956).

While disclaiming the need for interpretation on the ground that the state statutes are free of doubt, the majority below has proceeded to interpret the statutes and to base such interpretation, in part at least, upon legislative history. This assumption of power to interpret speaks eloquently for the fact that, even under the limited application of the doctrine of abstention adopted by the majority below, decision on the constitutionality of the state statutes should not have been reached.

The barratry statute (Chapter 35) under consideration in these cases denounces as a crime the offense of stirring up litigation. Definitions are set forth in Section 1 and read, in part, as follows:

> "(a) 'Barratry' is the offense of stirring up litigation.
>
> "(b) A 'barrator' is an individual, partnership, association or corporation who or which stirs up litigation.
>
> "(c) 'Stirring up litigation' means instigating or attempting to instigate a person or persons to institute a suit at law or equity.
>
> "(d) 'Instigating' means bringing it about that all or part of the expenses of the litigation are paid by the barrator or by a person or persons (other than the plaintiffs) acting in concert with the barrator, unless the instigation is justified."

The appellants cannot understand how anyone could reach the conclusion, upon reading the above quoted definitions, that an interpretation was not needed before determining the applicability of the barratry statute.

After argument was heard by the Court below, counsel was requested to submit a statement as to the facts which might show that the appellees were in violation of Chapters 31, 32 and 35.

The appellants informed the court below that the activities prohibited by the provisions of Chapter 35 may be considered as twofold, namely, stirring up litigation and payment of expenses of litigation. Furthermore, it was stated that the statute could be construed as requiring that both such activities occur before there could be a violation.

The question of charitable contributions also arose in the court below. The appellees charged that they were prohibited. The appellants contended that they were not prohibited if made either by a person who is not engaged in "stirring up litigation" or by a legal aid society.

The examples of the meaning of Chapter 35, mentioned above, make it abundantly clear that an authoritative interpretation of its provisions is necessary before reaching constitutional questions.

Finally, the appellants informed the court below that they had to admit and, indeed, admit to this Court, that they could not speak with certainty from the record as to whether either the Virginia State Conference or the NAACP was in violation of the provisions of Chapter 35.[5] Under these circumstances the court below should not have undertaken to pass on the constitutionality of Chapter 35.

The court below was also guilty of interpreting Chapter 32 while stating that its provisions were "free from ambi-

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[5] The Executive Secretary of the Virginia State Conference testified that it did not stir up litigation (R. 143, 144). The Executive Secretary of the NAACP testified that it does not request individuals to bring test case (R. 178). The record is silent concerning the activities of the Legal Defense Fund in the field of "stirring up litigation".

guity". It is stated that the third clause of Section 2 of the statute requiring registration of anyone whose activities cause or tend to cause racial conflicts is "so vague and indefinite" as not to satisfy constitutional requirements (159 F. Supp. 527). The case of *United States* v. *Harriss*, 347 U. S. 612 (1954), was relied upon.

In the *Harriss* case, the issue before this Court was the constitutionality of the disclosure provisions of the Federal Lobbying Act. The majority so construed the provisions as to overcome the objection of unconstitutional vagueness. It is of interest to note that the dissents in that case were based primarily on the ground that the act was constitutionally vague and could not be saved by construction.

Likewise, the first clause of Section 2 of Chapter 32, applying to any person whose principal activities include "the promoting or opposing in any manner the passage of legislation by the General Assembly" was held too broad to be valid under the ruling of the *Harriss* case, *supra* (159 F. Supp. 525). Certainly, it cannot be said that a state court is without authority to define and limit words and phrases, such as, "in any manner", found in state statutes in order to avoid constitutional questions.

It can be thus seen that the court below has interpreted provisions of Chapter 32. In view of the constitutional questions raised in these cases, a state court may place a different construction on Section 2 of Chapter 32.

Chapter 31 was declared unconstitutional for the same reasons as Chapter 32. Again, assuming the reasoning of the Court below to be correct as to the applicability of the rule of abstention, the statutes before this Court are not so plainly unconstitutional that by no interpretation could they be held constitutional, in full or in part.

II.

The Registration Statutes Were Enacted Under the Valid Exercise of the State's Police Power

All through the opinion of the majority of the court below runs the suggestion—and, at times, assertions—that the Commonwealth of Virginia is attempting to destroy the appellees through the enactment of the statutes now before this Court.

The appellees were permitted to introduce and the court below considered:

(1) A report of the Commission on Public Education which had been appointed by the Governor of Virginia to study the effects of the school segregation decisions;

(2) A resolution of the General Assembly of Virginia pledging its intention to resist illegal encroachments upon the State's sovereign powers;

(3) Action of delegates to a constitutional convention which amended the State Constitution to permit the payments of tuition grants;

(4) An address of the Governor of Virginia to the General Assembly required by the State Constitution for the purpose of recommending legislation, which address made no reference to the statutes here involved;

(5) Various statutes which were recommended by the Governor concerning the public schools of this State; and

(6) The Pupil Placement Act dealing with the assignment of pupils to the public schools, which act was not recommended by the Governor of Virginia.

The above recited evidence, if it can be so denoted, has no relation to the statutes here involved and cannot be used,

either severally or collectively, to deduce the legislative aims, motives, purposes, or intentions in enacting Chapters 31, 32 or 35.

But assuming that such "evidence" was directly related to the enactment of Chapters 31, 32 and 35, it could not be used, as was done by the court below, as a basis for determining the validity of the statutes. If there be one reasonable basis for the legislation, the motives of legislators, be they evil or otherwise, are immaterial insofar as the constitutionality of such legislation is concerned. *Goesaert* v. *Cleary*, 335 U. S. 464, 467 (1948).

Evidence was presented to show a reasonable basis for the enactment of the instant statutes. Chapters 31 and 35 deal with the regulation of litigation and the practice of law. As already pointed out, the testimony of some of the witnesses, who were plaintiffs in the school segregation cases, clearly indicated the need for such statutes. Further, one witness for the appellants testified that barratry and running and capping were widespread in connection with personal injury claims against railroads.

As to the necessity for Chapter 32, requiring the registration of those organizations engaged in racial activities, there is testimony to the effect that such a statute would aid in law enforcement in the event integration in the public schools occurred. There is further testimony of racial disturbances taking place outside of the state and the expression of opinion that the requirements of Chapter 32 would aid in the prevention of such disturbances.

Finally, the chief patron of all of the statutes, Delegate Mann, testified that it was not his aim or motive to destroy the appellees. He wished such legislation to prevent racial disturbances which were occurring in other states and to prevent the stirring up of litigation and running and cap-

ping which was evidently taking place in the State of Texas.

The principle that a court may not inquire into the motives which may have prompted a state legislature to act apparently was first laid down in the case of *Fletcher* v. *Peck,* 6 Cranch 87 (1809). In an opinion by Chief Justice Marshall it was said at page 131:

> "* * * The case, as made out in the pleadings, is simply this: One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were enduced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.
>
> "This solemn question cannot be brought thus collatorally and incidently before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influence certain members of the legislature which passed the law."

The case of *Goesaert* v. *Cleary, supra,* involved a Michigan statute which prohibited women, other than daughters and wives of licensed owners of bars, from being bartenders. It was urged that the intent of the legislature was to monopolize the liquor business for men. The statute was upheld and this Court pointed out that since the statute is not without basis in reason "we cannot cross-examine, either actually

or argumentatively, the minds of Michigan legislators or question their motives" (335 U. S. at page 466).

In the case of *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220 (1945), this Court had before it a South Carolina statute which prohibited undertakers from acting as agents for life insurance companies. It was contended that the statute affected only the defendant and that the insurance lobby had obtained the enactment. This Court appeared to disagree with the desirability of the statute, but said that the legislature of South Carolina could have thought that the funeral insurance business was evil. The opinion stated:

> "* * * a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality." [Citing numerous cases.] (at page 224).

See also, *Watkins* v. *United States*, 354 U. S. 178, 200 (1957), wherein it was held that the wrongful motives of members of congressional investigating committees will not vitiate investigation if a legislative purpose is being served by the work of the committee.

The "setting" in which the majority below placed these statutes before considering the constitutional issues was plainly improper and is not authorized by the decisions noted above.

It has already been said in this brief that the majority below disposed of the first clause of Section 2 of Chapter 32 on the ground that its terms were too broad. *United States* v. *Harriss, supra*, is not authority for this. To the contrary, it holds that such a provision as the first clause of Section 2 is not a restriction upon free speech if properly construed.

The Federal Lobbying Act, found in 2 USC Section 261 *et seq.* and considered in the *Harriss* case, requires designated reports to Congress from any person "receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of any legislation by Congress. Among the information required is the name and address of contributors of amounts over $500.00, and the name and address of persons to whom expenditures were made in excess of $10.00. Further information was required as to details of employment and otherwise concerning the lobbyists themselves. The federal statute is similar to Chapter 32 which may also be construed as applying only to persons who had direct contact with members of the General Assembly of Virginia.

> "Thus construed, §§ 305 and 308 also do not violate the freedoms guaranteed by the First Amendment—freedom to speak, publish and petition the Government.
>
> "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise *the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.* This is the evil which the Lobbying Act was designed to help prevent.
>
> "Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. *It wants only to know who is*

being hired, who is putting up the money, and how much."

* * *

"It is suggested, however, that the Lobbying Act, with respect to persons other than those defined in § 307, may as a practical matter act as a deterrent to their exercise of First Amendment rights. *Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act.* Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint. *But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.*" [Italics supplied] (347 U. S. 625, 626).

The second clause of Section 2 of Chapter 2 was also declared invalid as a denial of free speech though it was recognized that First Amendment freedoms are not absolute. That clause applies to those whose activities include "the advocating of racial integration or segregation."

The evidence in these cases clearly show that there is racial tension in the state at this time. Furthermore, the evidence shows that racial disturbances due to integration in the public schools have occurred in other states. Under these circumstances it was proper for the legislature to enact such statutes as Chapter 32.

A clear and present danger justifies a regulation by the state which may impose limitations upon free speech. In *Feiner* v. *New York*, 340 U. S. 315 (1951), a student ad-

dressed a crowd in Syracuse, New York, making derogatory remarks about public officials and indicating that the Negroes should rise up in arms and fight for equal rights. In view of the excitement aroused by his speech, the police on the scene requested him to stop speaking. He refused and was arrested. He was convicted under a New York statute which makes it a crime to provoke a breach of the peace by virtue of "offensive, disorderly, threatening, abusive or insulting language, conduct or behavior." This Court upheld the conviction on the basis that the restraint was necessary to prevent a breach of peace. Mr. Justice Black dissented.

In *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952), the defendant was convicted under an Illinois statute which reads, in part, as follows:

> "It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchasity, or lack of virtue of a class of citizens, of any race, color or creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. * * *." (at page 252)

The statement with which the defendant was charged with making was contained in a leaflet setting forth a petition calling on the Mayor and City Council of Chicago, to-wit:

> "* * * 'to halt the further encroachment, harrassment and invasion of white people, their property, neighborhoods and persons, by the Negro * * *.' Below was a call for 'One Million self respecting white

people in Chicago to unite. * * *' with the statement added that 'If persuasion and the need to prevent the white race from becoming mongrealized by the negro will not unite us, then the aggressions * * * rapes, robberies, knives, guns and marijuana of the negro, surely will.' This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc." (at page 252)

This Court, upon upholding the conviction, discussed at length inter-racial problems in Illinois as the basis of the statute, taking up in particular race riots. Speaking of the statute, this was said:

"* * * It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction. * * *." (at page 253).

"* * * Moreover, the Supreme Court's characterization of the words prohibited by the statute as those 'liable to cause violence and disorder' paraphrases the traditional justification for punishing libels criminally, namely their 'tendency to cause breach of the peace.' (at page 254).

"It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern Know-nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some

> explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. * * *" (at page 261).

Justices Black, Douglas and Jackson dissented.

The case of *Kasper* v. *Brittain*, 245 F. 2d 92 (6th Cir., 1957), cert. den. 355 U. S. 834 and petition for rehearing den. 355 U. S. 834 (1957), follows the holdings in the above-mentioned cases to the effect that a threat of racial violence justifies interference with free speech. It should be noted that the invasion of free speech in this case was an absolute prohibition and not a mere requirement of registration or identification. On August 29th, 1956 Kasper made a speech to a crowd of 1,000 or 1,500 to the effect that he had been served with an order prohibiting him from further hindering, obstructing, or in any way interfering with the carrying out of the court order and from picketing the high school either by words, acts or otherwise. He further told the crowds that the order did not mean anything and that the *Brown* case was not the law of the land.

Subsequent to Kasper's speeches on August 30th, 31st and September 1st, a mob estimated at 3,000 people formed, with which mob the local police officials, and others deputized to meet the emergency, clashed and, though tear gas was used, the mob could not be controlled. State police and the National Guard with a force of 667 men were necessary to restore order by virtue of fixed bayonets. The Circuit Court of Appeals found that Kasper had violated an injunction decree against interference with integration which had been issued by the lower federal court. The language of the opinion also clearly indicated that it considered such violence or threats of violence to come within the "clear and present danger" doctrine.

Under the authority of this Court's decisions discussed above, the state has a clear right to regulate the free speech of those whose activities are included in the second clause of Section 2 of Chapter 32.

Again, as previously stated in this brief, the third clause of Section 2 of Chapter 32 was condemned by the court below on the grounds of vagueness. The terms thereof require the registration of anyone whose activities cause or tend to cause racial conflicts or violence. In answer to this attack, the appellants once more reply upon *United States* v. *Harris, supra.* There, this court said:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.
>
> *"On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. * * * And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction. * * *"* [Italics supplied]. (347 U. S. at pp. 617, 618)

If the appellees' activities do not come within the terms of the third clause of Section 2 of Chapter 32, they had no standing in the court below to challenge their validity. On the other hand, if their activities do fall within the terms of such clause, as the record indicates, the language of this Court in the *Harriss* case, is applicable.

The fourth clause of Section 2 of Chapter 32 requires the registration of anyone who engages in the raising or expending of funds for the employment of counsel or the payment of costs in connection with litigation on behalf of any race.

Chapter 31 has no requirements similar to those found in the first three clauses of Section 2 of Chapter 32, and its provisions are not concerned with the regulation of litigation solely on behalf of a particular race. Its terms do require the registration of anyone who solicits funds from the public for use in litigation in which he has no pecuniary right or liability therein.

The court below implies that the mere registration of those engaged in the litigation described in the fourth clause of Section 2 of Chapter 32 and in Chapter 31 is, perhaps, not a violation of the Due Process Clause of the Fourteenth Amendment. Further, the requirements of Chapters 31 and 32 that the collectors of the funds to be spent in litigation must register is not an undue restriction on free speech. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) and *Thomas* v. *Collins*, 323 U. S. 516 (1945).

The "onerous" restrictions in these statutes, according to the majority below, is the requirement of the disclosure of every contributor and of every member of an organization whose dues may be used to finance litigation. It is the contention of the appellants that the public interest of this State justifies this type of regulation and that this Court's decision in *Bryant* v. *Zimmerman*, 278 U. S. 63 (1928) is authority therefor.

Statutes requiring registration of persons and organizations who engage in certain activities or of members of certain organizations are not new to the jurisprudence of the United States. Statutes requiring certain persons or organizations to list their sources of income and their ex-

penditures with particularity are no rarity. Such statutes are found in the United States Code as well as upon the statute books of the states. *United States* v. *Harriss, supra.*

The Federal Corrupt Practices Act, 2 U. S. C. Section 241, *et seq.*, provides that the treasurer of a political committee shall file a statement with the name and address of each person contributing $100.00 in a calendar year and the name and address of each person to whom an expenditure of over $100.00 is made. The statute was upheld in *Burroughs* v. *United States,* 290 U. S. 534 (1934).

Another registration act is that contained in the Internal Revenue Code of 1939, 26 U. S. C. Section 1132 *et seq.*, which requires registration by "every person possessing a firearm" with the local district collector. The information required is the number or other identification of the firearm, the name and address of the possessor, the place where the firearm is normally kept, and the place of business or employment of the possessor. The registration provisions of this statute were upheld in *Sonzinsky* v. *United States,* 300 U. S. 506 (1937).

In the case of *Lewis Publishing Company* v. *Morgan,* 229 U. S. 288 (1913), the Federal statute requiring users of the mails for newspapers or other publications to furnish each year a sworn statement of the names and post office addresses of the editor, the publisher, the business manager and the owners or stockholders, if the publication was a corporation, and the bondholder, mortgagees and other security holders was upheld.

Bryant v. *Zimmerman, supra,* involved a New York statute which provided that every membership corporation or unincorporated association with 20 or more members, requiring their oath as a condition of membership, should register (1) its constitution, (2) its by-laws, (3) its rules,

(4) its regulations, (5) its oath of membership, (6) a roster of its members, and (7) a list of its officers. Being a member of a non-complying organization was made a misdemeanor. A conviction under this statute was upheld on three grounds: (1) the right to be a member of a secret organization is not a "privilege or immunity" guaranteed by the Fourteenth Amendment; (2) even if membership is a liberty guaranteed by the Fourteenth Amendment, it is subject to the State police power; and (3) equal protection of the laws is not denied by virtue of exclusion of certain other membership oath-bound corporations. The specific exclusions were labor unions, fraternities composed only of students and benevolent orders. The holding of this Court is contained in the following quote:

> "There are various privileges and immunities which under our dual system of government belong to citizens of the United States solely by reason of such citizenship. It is against their abridgment by state laws that the privilege and immunity clause in the 14th Amendment is directed. But no such privilege or immunity is in question here. If to be and remain a member of a secret, oath-bound association within a state be a privilege arising out of citizenship at all, it is an incident of state rather than United States ctizenship; and such protection as is thrown about it by the Constitution is no wise affected by its possessor being a citizen of the United States. Thus there is no basis here for invoking the privilege and immunity clause.
>
> "The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power. *There can be no doubt that under that power the state may prescribe and apply to associations having an oath-bound member-*

ship any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare. The requirement in § 53 that each association shall file with the secretary of state a sworn copy of its constitution, oath of membership, etc., with a list of members and officers, is such a regulation. It proceeds on the twofold theory that the state within whose territory and under whose protection the association exists is entitled to be informed of its nature and purpose, of whom it is composed and by whom its activities are conducted, and that requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required. The requirement is not arbitrary or oppressive, but reasonable and likely to be of real effect. Of course, power to require the disclosure includes authority to prevent individual members of an association which has failed to comply from attending meetings or retaining membership with knowledge of its default. We conclude that the due process clause is not violated." [Italics supplied] (278 U. S. 63, 71, 72).

The only difference between the facts in *Bryant* v. *Zimmerman* is that the organizations proscribed by that statute for registration are oath-bound organizations. It would seem to be an absurd distinction to require registration of members of oath-bound organizations while holding that registration cannot be required of organizations which do not have a secret oath. Under the facts of that case, any organization which refused to disclose its members was, in fact, a secret organization. A distinction between those organizations requiring an oath and those who do not require an oath as a matter of constitutional law would seem to be a distinction without substance.

Further, it is admitted that there may be two concepts of secret organizations: (1) those whose very existence is, in fact, a secret and (2) those whose members are protected by a cloak of secrecy. We think that it is clear that the latter concept is the one covered by the New York statute. An organization which has a charter from the State certainly does not have a secret existence. The Ku-Klux Klan, which was the organization involved in the *Bryant* v. *Zimmerman* litigation, is, in fact, incorporated under the laws of many states.

The court below attempted to distinguish the *Bryant* case by asserting that the New York statute, unlike Chapter 32, was aimed at curbing "activities of an association likely to engage in violations of the law." The first answer to this is that the evidence summarized in this brief indicates that Chapter 32 was enacted to help prevent disorder or violence. Secondly, regardless of the aims of either the New York statute or the Virginia statute, the provisions of both apply to associations, such as adult fraternities and various other groups in Virginia, whose members are not likely to engage in violations of law.

In the recent case of *NAACP* v. *Alabama*, 357 U. S. 449 (1958), this Court stated that the decision in *Bryant* v. *Zimmerman, supra*, was "based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence" (at page 465).

The appellants respectfully submit that the decision in the *Bryant* case was only partially based on the particular character of the organization. The court discussed the claim that the New York statute violated the Due Process Clause of the Fourteenth Amendment and concluded that it did not. *At this point in the decision no mention was made of the character of the organization.* Further, it is safe to

assume that no mention would have been made of the type of organization except for the exemptions contained in the statute. Because of certain exemptions, previously set forth in this brief, it was claimed that the Equal Protection Clause had been violated. *At this point a discussion of the activities of the organization became necessary.* It was completely separate from the due process question and so treated. The Court assumed that the legislature of New York felt that the organization in question had unworthy aims and concluded:

> "We think it plain that the action of the courts below in holding that there was a real and substantial basis for the distinction made between the two sets of associations or orders was right and should not be disturbed." (278 U. S. at p. 77).

It is respectfully submitted, therefore, that the Virginia registration statutes do not violate the Due Process Clause under the authority of *Bryant* v. *Zimmerman, supra.* To hold otherwise, will require this Court to overrule that decision.

In *NAACP* v. *Alabama, supra,* which was decided by this Court prior to the noting of jurisdiction in these cases, it was held that the State of Alabama could not require the NAACP to file its membership lists under a law requiring foreign corporations to register with the Secretary of State. Such a requirement, under the facts and circumstances of that case, was held to be a denial of due process. The facts and circumstances were:

1. On past occasions revelation of the identify of the NAACP's *rank-and-file* members had exposed them to economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility;

2. The filing of membership lists had no substantial bearing on the questions of whether the NAACP was conducting an intrastate business in Alabama and whether its activities, without qualifying to do business, suggested its permanent ouster from the State; and

3. The State of Alabama had fallen short of showing a controlling justification for restricting freedom of association.

The facts, as shown by the record in these cases are different in that:

1. It was not shown that a single "rank-and-file" member of the NAACP had been exposed to economic reprisals or loss of employment. Furthermore, as shown in the appellants' "Statement of the Case" only one member of the NAACP was subject to threats and he was the president of the local branch in Norfolk. Some of the plaintiffs in the Prince Edward County segregation case, who testified in these cases, stated that their relations with white people in the county had not changed and that they had not been mistreated (R. 353, 360, 364, 370). The plain facts are that the disclosure of rank-and-file membership lists will not promote or cause reprisals. To state it another way, if reprisals are to be made against Negroes because of their interest in integration, the withholding of membership lists of the NAACP will not prevent them.

2. The facts in these cases concerning the necessity for and the purposes of the registration statutes make it clear that the alleged restrictions on freedom of association are in the public interest and constitute a reasonable exercise of the State's police power.

3. The record shows that the Commonwealth of Virginia

has a controlling justification for the enactment of these statutes.

As to the registration of members under Chapter 32, the question has been raised: for what purposes can a law enforcement officer use these lists as an aid? Some such purposes are (1) to help in selection of deputies, and prevent deputizing a person participating actively in an organization agitating violence; (2) to identify certain known troublemakers as members of particular organization, and to thereby identify their leaders; (3) to keep a check on agitators from outside the community; (4) a list of the members of a local organization would apprise sheriffs of the possibilities of violence from such organization; and (5) a possible deterrent to persons against joining organizations under irresponsible leadership or engaged in unlawful activities.

These statutes promote and advance free speech rather than operate as a restriction. By requiring the identification of persons who would speak through the anonymous veil of a corporate or similar impersonal entity, listeners are enabled to properly evaluate the source of the speech with which they are confronted. These statutes would correctly identify the people who are backing agitating, as well as legitimate, organizations and would enable persons who are recklessly accused to defend themselves.

Irresponsible persons have always preferred a cloak of anonymity through which to work. If persons who back such anonymous organizations are of a responsible character, publication of their names should lend impetus to and not detract from their cause.

Acts of violence perpetuated by the Ku-Klux Klan and the Union League under this protective cloak of secrecy are written in the pages of history, and the Union League is perhaps one of the best examples of a legitimate organiza-

tion which fell into bad hands. The Ku-Klux Klan is another prime example of what can happen when responsible leadership is replaced by the irresponsible. If the State cannot know who are the leaders of these groups, as well as the rank and file, how can it determine whether they are a possible source of trouble? There is testimony in the record that a local branch of the NAACP has committed violent acts upon mere refusal of a Negro to join its organization.

Admitting that the appellee corporations do not engage in violent activities today, there is no assurance that their branches will not under different circumstances. They admit that their control over these branches is "minimal." The legislature could certainly believe that organizations engaged in the activities defined by the statute would be the most likely to become involved in violence resulting from racial tension. Leadership in legitimate organizations does not always remain conservative. In fact, there is no contradiction in this record of the coercive and forceful activities of the Halifax branch of the NAACP.

With regard to Chapter 31 and the information required thereby, it should be clear that this statute is an aid to detect those persons who are engaging in barratry, maintenance, unauthorized practice of law and related offenses. Inherent in the power to regulate the practice of law is the right to compel information which will enable the state to determine whether or not its laws and regulations are being violated.

To deny the state the right to require membership lists, contributions to and expenditures of such organizations is to effectively deny to the state the right to regulate organized conduct.

In conclusion, it cannot be said that each and every item of information required to be divulged by the registration statutes are improper subjects of a state's interest. Accord-

ing to *NAACP* v. *Alabama, supra,* most of these items are beyond a constitutional challenge. The majority below was in error when it assumed that these proper items of information should not remain in the statutes.

III.

Chapter 35 Does Not Violate the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment

The court below stated that the barratry statute "obviously" violated the Equal Protection Clause since it denied appellees the right to defray the expenses of racial litigation while permitting legal aid societies to do so if they served all "needy" persons in all sorts of litigation. In the first place, the record does not show that appellees serve only "needy" persons. Secondly, as previously pointed out in this brief, the provisions of Chapter 35 may be construed as prohibiting legal aid only when a person is guilty of stirring up the litigation. Under such circumstances, a member of a legal aid society would be guilty of a violation of the Canons of Ethics and the common law offense of barratry.

The opinion of the majority below states that "no argument has been offered to the court to sustain this discrimination" (159 F. Supp. 533). Nothing more was said about this alleged violation of the Equal Protection Clause, even though the burden was upon the appellees to show that Chapter 35 violated the Fourteenth Amendment.

The classification condemned by the court below is based upon long-recognized standards of the legal profession and the appellants are aware of no case which holds that such a classification is so arbitrary as to be a denial of the equal protection of the laws.

Chapter 35, as pointed out, creates the statutory offense of barratry. It conforms to the common law crime with two minor exceptions. The statute, contrary to the common

law, requires that the barrator be shown to have participated in payment of the expenses of the litigation. This, of course, is more consideration than given to the common law barrator. Secondly, under the common law, it had to be proven that the barrator stirred up litigation on more than one occasion.

The practice of law or the following of any of the professions has for centuries been considered a privilege, to be conferred by the State with great discretion and very definitely not as a matter of right. The forty-eight states, as well as the Federal government, have always deemed it wise to regulate strictly the practice of law in their courts. Strict regulation of other professions is a matter of statutory record.

These regulations are usually of two types: (1) licensing requirements of persons who would engage in the profession; and (2) further regulation of these persons who have obtained licenses. A necessary incident of this is to define what may or may not be done by laymen affecting the practice of law.

In determining the constitutionality of Chapter 35, the case of *McCloskey* v. *Tobin,* 252 U. S. 107 (1920), is material. A Texas statute defined with much detail the offense of barratry and maintenance. It proscribed in particular any person who "shall seek to obtain employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment." The petitioner was arrested and convicted for soliciting employment to collect two claims, one for personal injuries and the other for painting a buggy.

> "The contention is, that since the state had made causes of action in tort as well as in contract assignable (Galveston, H. & S.A.R. Co. v. Ginther, 96 Tex. 295, 72 S. W. 166), they had become an article of com-

merce; that the business of obtaining adjustment of claims is not inherently evil; and that, therefore, while regulation was permissible, prohibition of the business violates rights of liberty and property; and denies equal protection of the laws: The contention may be answered briefly. To prohibit solicitation is to regulate the business, not to prohibit it. Compare Brazee v. Michigan, 241 U. S. 340, 60 L. Ed. 1034, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917C, 522. The evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. . . . Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable." (252 U. S. 108)

The right to practice law is not one of the privileges and immunities guaranteed by the Fourteenth Amendment. *Bradwell* v. *Illinois*, 16 Wall. 130; *In Re Lockwood*, 154 U. S. 116 (1894).

The fact that an individual or certain individuals may be put out of business by a regulation is no reason for declaring it invalid. As was said in *Re Issermen*, 345 U. S. 286:

"There is no vested right in an individual to practice law. Rather, there is a right in the Court to protect itself, and, hence, society as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the Court and cannot deter the Court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the Court." (345 U. S. 289)

The vitality of the above mentioned regulation is not vitiated by the dissent, which is based upon a different view of what related to improper conduct in a Federal court.

In 348 U. S. 1, upon rehearing, the dissent prevailed (apparently because of the failure of the Chief Justice to be present). Even so, while this Court decided not to disbar Isserman from practice before it, it did not upset the disbarment by the New Jersey court based upon the same facts. (In *Re Isserman*, 87 A. 2d 903, 9 N. J. 269, *cert. den.* 345 U. S. 927.) It is implicit in these decisions when they are taken together that a state may apply more stringent standards for practice before its courts than those required by the Federal courts.

When the proper construction is given the provisions of Chapter 35 it can be seen that the State is merely regulating the activities that have long been prohibited by the common law and condemned by the legal profession.

CONCLUSION

For the reasons heretofore stated, this Court should vacate the judgment of the Court below with directions to dismiss these cases or retain jurisdiction until efforts are made by the appellees to obtain an authoritative construction of the statutes in the state courts. In the alternative, this Court should reverse the judgment of the court below on the ground that the statutes here involved do not violate the Fourteenth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the aforegoing brief have been served by depositing the same in a United States mail box, with first class postage prepaid, to the following counsel of record:

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